IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7200 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.N.PATEL

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AMZAD YASIMKHAN PATHAN

Versus

DAHYABHAI MORARBHAI AHIR

Appearance:

1. Special Civil Application No. 7200 of 2004

MR DHIRENDRA MEHTA for Petitioner No. 1-2

MS KJ BRAHMBHATT with

MS VARSHA BRAHMBHATT for Respondent No. 1

DELETED for Respondent No. 2-14

CORAM : HON'BLE MR.JUSTICE D.N.PATEL

Date of decision:06/08/2004

C.A.V. JUDGEMENT

1. Rule. Ms. K.J. Brahmabhatt, learned advocate appearing for the respondent No. 1 waive service of notice of Rule on behalf of the respondent No.1. Upon the request of learned advocate appearing for the parties, this petition is taken up for final hearing today.

2. The present petition is preferred under Article 227 of the Constitution of India, whereby the petitioners have challenged the order dated 26-2-2004 passed by the 4th Joint Civil Judge (SD), Surat below the application exh.98 in Special Civil Suit No. 118 of 2003 and for giving direction to the trial Court to hear and decide the application exh. 93 filed by the present petitioners in Special Civil Suit No. 118 of 2003 for joining them as party defendants in the said suit, before final hearing, adjudication and decision of the application exh. 5 takes place.

3. Learned advocate appearing for the petitioners submitted that the respondent no. 1 has preferred Special Civil Suit No. 118 of 2003 before the Civil Court (SD), Surat against the six respondents for declaration and permanent injunction in respect of final plot no. 172 of Town Planning Scheme No. 7, Surat City, to the effect that the defendants may not make construction in the said final plot.

4. Learned advocate for the petitioners further submitted that in Special Civil Suit No. 118 of 2003 though originally six defendants were there, subsequently other persons preferred the application exh.61 for joining them party defendants in the aforesaid suit mainly on the basis that out of the main final plot No.172, certain sub-plots were given to those applicants by the original plaintiff i.e. the present respondent no.1, because of this allotment of sub-plots situated at final plot No. 172 the applicants of that application exh.61 pointed out to the trial Court they were the interested and necessary parties to Special Civil Suit No.118 of 2003.

5. Upon hearing of the application exh.61, the order was passed by the trial Court on 16-10-2003 (pg.35 of paper book of the present petition), whereby the trial Court has assigned cogent and convincing reasons and virtually that application exh.61 was allowed and the applicants of that application exh.61 were allowed to be joined as co-defendants in Special Civil Suit No. 118 of 2003. The application exh.61 was allowed for the applicants and they were joined as defendants no. 7 to

13. The petitioners' case is also like the case of those applicants. They also preferred application for joining party defendants but they are not allowed to be joined as defendants in the suit and therefore the present petition.

6. It is also contended by the learned advocate for the petitioners that the petitioners are sailing in the same boat with the applicants of the application exh.61 filed in Special Civil Suit No. 118 of 2003. The present petitioners have also preferred an application exh.93 for joining them as party defendants on 23-2-2004 in Special Civil Suit No. 118 of 2003. But the trial Court has not decided the said application exh.93. The petitioners have also purchased the sub-plots situated on final plot No. 172 of T.P. Scheme No.7 of Surat City. He has submitted that as the application exh. 93 filed by the present petitioners was not decided, and hence one more application exh. 98 was tendered by the petitioners before the trial Court requesting for early hearing and deciding the application exh. 93. The said second application was necessary because day to day hearing of the interim injunction application exh. 5 filed in Special Civil Suit No. 118 of 2003 was going on and though the petitioners were interested and necessary parties in Special Civil Suit No. 118 of 2003, were not able to assist the Court effectively and therefore a prayer was made before the trail Court by the petitioners that their application exh. 93 for joining them as party defendants in Special. Civil Suit No.118 of 2003 ought to have been decided prior to hearing and decision of the application exh.5 (stay application) in Special Civil Suit No. 118 of 2003. Not only that, the petitioners were interested and necessary parties in the aforesaid suit. To avoid multiplicity and multifariousness of the proceedings, the present petitioners ought to have been joined or at least an application exh. 93 for joining them as party respondents ought to have been decided, prior to the decision below application exh. 5. This aspect of the matter has not been appreciated by the trial Court and hence the impugned order dated 26-2-2004 passed by the trial Court is illegal and erroneous and hence the same deserves to be quashed and set aside.

7. Learned advocate appearing for the petitioners further submitted that neither the application exh. 93 nor the application exh. 98 has been decided by the trial Court though the aforesaid crystal clear proposition of facts and law was pointed out to the trial Court and one more application exh. 99 was tendered by the present petition on 27-2-2004. Once again it was

prayed by the petitioner before the trial Court that the application exh.93 may kindly be decided prior to the application exh. 5 is decided. But instead of deciding the application, the trial Court has dismissed the application exh.98 preferred by the petitioners (copy is annexed at page No.70 to 77 of the memo of the petition).

8. It is contended by the learned advocate for the petitioners that the impugned order passed below the application exh.98 is prima facie erroneous and bad in law and de-hors to the facts of the present case. Therefore, the impugned order of the trial Court deserves to be quashed and set aside, inasmuch as the following facts :

i. The trial Court though has allowed the application exh. 61 of the similarly situated persons for joining them as co-defendants, the application exh.93 of the present petitioners is not decided by the trial Court.

ii. The present petitioners have preferred the application exh.93 for joining them as party defendants as they have purchased the plots in Final Plot No. 172 of T.P.Scheme No.7 of Surat City but the same has not been decided;

iii. There is direct interest of the present petitioners in the suit property as they have become owners and they are enjoying actual possession of the plots from year 1993. Therefore, the petitioners are interested and necessary parties in Special Civil Suit No. 118 of 2003.

9. Unless and until, the petitioners are joined as party defendants to Special Civil Suit No.118 of 2003, they are unable to point out suppression of material facts in Special Civil Suit No. 118 of 2003 to the effect that the suits for the very same final plot No. 172 of T.P. Scheme No.7 of Surat City is pending before the same trial Court. Not only that the suit is pending for the same plot No. 172 but the application exh. 5 is preferred and the stay has been granted by the trial Court. This aspect of the matter affects the very root of Special Civil Suit No. 118 of 2003 and therefore the petitioners ought to have been joined as party defendants by the trial court or at least their application exh.93 in Special Civil Suit No. 118 of 2003 for joining them

as party defendants ought to have been decided by the trial Court.

10. If the petitioners are not allowed to be joined as party defendants to the aforesaid suit, there will be multiplicity of suits and proceedings and to avoid multifariousness of the suits the present petitioners ought to have been joined as party defendants to the aforesaid suit.

11. The notice was issued by this Court and the same was served to the respondents and the respondent no. 1 has filed the affidavit-in-reply. Learned advocate appearing for the respondent no. 1 mainly submitted that the application exh.93 for joining party defendants is vexatious in nature. The same is preferred to delay the proceedings. Earlier also some other applicants had preferred the application for joining party defendants but the same was not much objected by the original plaintiffs. But now second lot of applicants have filed the application for joining party defendants. Therefore the application exh.93, cannot be allowed as the same is preferred only with a view to delay the hearing of the application exh.5 preferred by the original plaintiffs.

12. I have considered the submissions made by the learned advocates for the parties. I have also perused the relevant papers including the orders passed by the Court below as well as the various applications as referred hereinabove which are preferred in Special Civil Suit No. 118 of 2003.

13. Looking to the facts and circumstances of the case and the material on record the order dated 26-2-2004 passed by the trial Court, below the application exh.98 in Special Civil Suit No. 118 of 2003 is erroneous and bad in law and de-hors to the facts. The trial Court has not properly appreciated the following facts :

i. Similarly situated persons like the present petitioners (original applicants in the application exh.93) who have been joined as party co-defendants vide the order passed by the trial Court below the application exh.61 on 16-10-2003;

ii. The petitioners (original applicants are in possession of the property in question since 1993;

iii. The petitioners (original applicants)

also preferred Regular Civil Suit No. 232 of 2002 and Regular Civil Suit No.248 of 2002 for the very same property bearing Plot No. 172 of T.P. Scheme No.7 of Surat City.

iv. Not only this, but the application exh.5 has also been filed in Regular Civil Suits Nos.232 of 2002 and 248 of 2002. To bring these facts on record, the applicants ought to have been joined as co-defendants in Special. Civil Suit No.118 of 2003 or at least their application exh. 93 ought to have been decided by the trial Court to avoid multiplicity of suits and multifariousness of the proceedings.

14. In the peculiar facts and circumstances of the case and the orders passed by the trial Court as stated hereinabove, it is clear that the trial Court has lost sight in not deciding the application exh.93 preferred by the present petitioners in Special Civil Suit No. 118 of 2003. The reasons assigned by the trial Court in the order dated 26-2-2004 passed below the application exh.98 in Special Civil Suit No. 118 of 2003 are not true and are incorrect. Therefore, the impugned order dated 26-2-2004 passed by the trail Court below the application exh. 98 in Special Civil Suit No. 118 of 2003 is erroneous, improper and bad in law and hence the same deserves to be quashed and set aside. Accordingly, the present petition is allowed and the impugned order dated 26-2-2004 passed by the trial Court below the application exh. 98 in Special Civil Suit No. 118 of 2003 is hereby quashed and set aside. Rule is made absolute to the aforesaid extent, with no order as to costs.

15. In the peculiar facts of the case, the trial Court is directed to the decide the application exh. 93 filed by the present petitioners in Special Civil Suit No.118 of 2003 in accordance with law, as early as possible practicable and preferably within two weeks from the date of receipt of writ of this Court before the application exh.5 filed in Special Civil Suit No. 118 of 2003 is decided by the trial Court.

(D.N. Patel, J.)

_/\/Satwara/